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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Estate of PATRICIA STEWART, Deceased.	
JOHN H. STEWART, Contestant and Appellant, v. MICHAEL DOWNEY, as administrator, etc., et al., Contestants and Respondents.	A148396 (Humboldt County Super. Ct. Nos. PR090102, PR090073)
DEBORAH BASON LEAN, Plaintiff and Appellant, v. JAMES LEWIS TAYLOR, Defendant and Respondent.	A151849 (Humboldt County Super. Ct. Nos. PR090102)
JOHN H. STEWART, Plaintiff and Appellant, v. MICHAEL DOWNEY, as administrator, etc., Defendant and Respondent; JAMES TAYLOR et al., Intervenors and Respondents.	A150463, A148501 (Humboldt County Super. Ct. Nos. DR081020)

In these consolidated appeals,[1] John H. Stewart appeals from the probate court's orders dismissing the probate of decedent Patricia Lean Stewart's April 2007 will and disallowing his contest to the probate of her February 2009 will on the ground that he lacks standing. Deborah Bason Lean, Patricia's surviving sister, appeals from the court's order dismissing her petition to revoke probate of the February 2009 will after she failed to join in Stewart's earlier will contest. In two other appeals, Stewart challenges the judgment following a jury trial in a breach of contract action he commenced against Patricia shortly before her death and the posttrial order denying his motion to tax costs. We dismiss Deborah's appeal for lack of standing, and otherwise affirm in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

The procedural history of this decade-long case is tangled and lengthy. Because the parties and this court are familiar with the factual circumstances and extensive litigation surrounding these matters, we will set forth only as much background as is relevant to the disposition of these appeals.

A. *Patricia and Stewart Marry and Divorce*

Appellant John H. Stewart (Stewart) and decedent Patricia Lean Stewart (Patricia) married in October 1994. Prior to their marriage, they entered into an oral agreement in 1993 by which they resolved to take care of each other and share equally in their property until one or the other died.[2] The following year, Patricia acquired ranch property on Crooked Prairie Road in Humboldt County (the Ranch) with proceeds from a family inheritance, holding title as "a single woman." She and Stewart took up residence on the Ranch. In August 1994, Stewart and Patricia allegedly modified their *Marvin* agreement to provide that the Ranch "would become the sole property of the survivor upon the death of the other party." They married two months later.

In April 2007, Patricia executed a will (April 2007 Will) that left her estate to Stewart. Marital discord followed shortly thereafter. In October, Stewart was ordered to

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[1] On the court's own motion, in the interests of judicial economy, we consolidate the four appeals here for purposes of decision.

[2] This is known as a *Marvin* agreement. (*Marvin v. Marvin* (1976) 18 Cal.3d 660.)

vacate the Ranch after Patricia filed a petition against him under the Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.). In November, Patricia executed a will revoking her previous will and naming her sister, Deborah Bason Lean (Deborah), as sole beneficiary. The next day, Patricia filed for divorce from Stewart.

During the divorce proceedings, Stewart filed a petition to establish a conservatorship over Patricia, who suffered from multiple sclerosis and was physically disabled. Stewart sought to stay the divorce to require an assessment of Patricia's capacity. The family law court denied Stewart's stay request, and in August 2008, a jury found that conservatorship was unnecessary. His conservatorship petition was ordered dismissed.[3] Stewart also initiated a civil action against Patricia, alleging breach of their *Marvin* agreement and requesting specific performance over the Ranch.[4] As described below, the breach of contract action was tried before a jury in 2016 and is the subject of two of the pending appeals.

On December 16, 2008, the family court issued a written decision granting Patricia's petition and declaring the marriage dissolved. After a two-day bench trial, the court found Patricia competent and able to participate in the dissolution proceedings, and found that an interspousal deed quitclaiming the Ranch to Stewart in 2005 had been procured by undue influence and was invalid. The court therefore ruled that the Ranch was Patricia's sole and separate property. A judgment of dissolution was entered on February 5, 2009.[5] Following her divorce, Patricia sold the Ranch to respondents William and Ronda Rolff (referred to herein as Rolff).

B. Stewart Contests the February 2009 Will

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[3] *Conservatorship of Stewart* (Super. Ct. Humboldt County, 2008, No. PR080037).) We affirmed. (*Conservatorship of Stewart* (Aug. 23, 2011, A123544 [nonpub. opn.].)

[4] *Stewart v. Stewart* (Super. Ct. Humboldt County, 2008, No. DR081020).

[5] *In re Marriage of Stewart* (Super. Ct. Humboldt County, 2007, No. FL070587.) We affirmed in January 2012. (*Parris v. Stewart (In re Lean*), *supra*, A124777.)

In the meantime, respondent James Taylor was hired in March 2007 to be Patricia's registered nurse and caretaker. Patricia was by then a dependent adult who required assistance with all aspects of daily living. On February 20, 2009, Patricia executed a last will and testament naming Taylor the executor of the estate and primary beneficiary (February 2009 Will). Pursuant to Probate Code section 21384, a certificate of independent review was prepared by attorney Douglas Kaber, who independently reviewed the circumstances of the will and found both the will and its bequests to be legitimate and in keeping with Patricia's wishes. Patricia died on February 23, 2009. The next day, Stewart recorded the interspousal transfer deed for the Ranch that the family law court had declared unenforceable two months earlier. (See *Parris v. Stewart (In re Lean*) (Jan. 26, 2012, A124777 [nonpub. opn.].)[6]

Shortly after Patricia's passing, Stewart filed a petition to admit the April 2007 Will into probate. Taylor filed a competing petition for probate of the February 2009 Will. On April 16, 2009, Stewart filed a will contest and opposition to probate of the February 2009 Will. As set forth in his petition, and by later amendments, Stewart alleged he was a person interested in Patricia's estate as her surviving spouse and as the named beneficiary of the April 2007 Will. Taylor then filed a demurrer to the will contest and served Deborah with a copy. The probate court consolidated the actions and appointed the Humboldt County Public Administrator as special administrator of

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[6] As reflected in the background, Stewart has unsuccessfully litigated many claims over the past 10 years across several courts. In addition to the above-mentioned cases, we affirmed the trial court's order denying Stewart's motion for a preliminary injunction in the breach of contract action. (*Stewart v. Parris* (July 21, 2010, A126382 [nonpub. opn.] (*Stewart v. Parris I*).) We dismissed two other appeals filed by Stewart as untimely (*Stewart v. Parris*, A131721, *Stewart v. Parris*, A132208), and we affirmed the judgment in the marital dissolution action (*Parris v. Stewart (In re Lean*), *supra*, A124777). In truth, this recitation only scratches the surface of Stewart's surfeit of petitions, motions, and appeals. His repeated abuse of the legal process resulted in orders from the trial court in 2016 declaring him a vexatious litigant and barring him from filing future litigation in propria persona without leave of court. We affirmed, agreeing that the orders were amply justified. (*Stewart v. Downey* (Mar. 16, 2018, A150150 [nonpub. opn.].)

Patricia's estate. Although provided with notice, Deborah did not join in the will contest or file objections to the February 2009 Will.

The probate matters were relatively quiet until October 2014 when Taylor filed a motion in limine asserting that Stewart lacked standing to contest the February 2009 Will. Taylor asserted that Stewart was not an interested person in the estate because, upon dissolution of his marriage to Patricia prior to her death, his beneficial interest in the April 2007 Will was voided by operation of law, and he cannot be deemed to be a "surviving spouse."

On December 16, 2014, Deborah executed an assignment granting Stewart all her rights as an heir of Patricia, including her right to contest any will signed by Patricia, but reserving for herself the right to nominate a personal representative. One year later, on December 28, 2015, the probate court heard argument on the motion in limine. Stewart, apparently acting as Deborah's attorney as well as an assignee on his own behalf, argued that the assignment gave him standing to contest the will. Stewart also claimed to have standing by virtue of his breach of contract action against the estate and the related creditor's claim he had filed with the probate court. The court granted the motion in limine and, by minute order, ruled that Stewart did not have standing to maintain a will contest and that the will contest was no longer at issue in the probate proceedings.

C. The Probate Court Concludes the February 2009 Will Is Valid

On March 24, 2016, the probate court held a trial on the validity of the February 2009 Will, addressing Patricia's testamentary capacity and the certificate of independent review. The court reviewed Patricia's recent hospital records, including Dr. Michael Fratkin's notes that Patricia was alert, oriented, and in no acute distress. Counsel for the special administrator reported that Dr. James S. Guetzkow, referred to her by Stewart, had submitted a letter expressing his doubts as to Patricia's capacity.[7] Dr. Guetzkow

[7] Although Stewart was excluded from the hearing concerning the validity of the February 2009 Will, the probate court suggested that he contact the special administrator with any concerns he may have about the will.

reportedly did not respond to counsel's follow-up questions about Patricia's medical records, and the court declined to admit Dr. Guetzkow's letter into evidence.

John Davis represented Patricia during her divorce proceedings and had been her attorney since March 2008. He testified that Patricia was physically disabled and required the use of a wheelchair. Patricia had some problems speaking, her hands were a bit shaky, she sometimes had a tremor in her voice, and she tired easily. However, Davis always believed Patricia had the capacity to make her own decisions. He noted that during the marriage dissolution hearing in December 2008, Stewart raised multiple unsuccessful challenges to her competency.[8]

Davis testified that in February 2009, he was summoned to the hospital because Patricia wanted to make a new will. When he arrived, Taylor was present but left the room. Patricia instructed Davis that she wanted to revoke her prior will leaving everything to Deborah. She explained she had not had much contact with her sister in the last several years, and Deborah had not visited when Patricia was ill. Patricia wanted $10,000 of her estate to go to a hospice organization, with the remainder going to Taylor. She later added a $10,000 bequest for the ASPCA. To Davis, she seemed clear and lucid about her wishes, understanding the nature of the testamentary act as well as the nature and status of her property. She also understood her relationship to Deborah. Davis prepared a draft will and returned to the hospital that afternoon. He explained that because Taylor was her caregiver, another lawyer would have to advise her. With her consent, he contacted an attorney in Eureka named Douglas Kaber. The next day, Kaber's office agreed to do a certificate of independent review.

Kaber testified that he was not associated with Davis's firm. He explained that a certificate of independent review is done to make sure that the testator is competent to

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[8] Dissolution proceedings were held two months before Patricia's death. At trial, the family court repeatedly found that Patricia was "highly competent," "highly aware of these proceedings" and able to listen and participate. The court remarked: "So we'd like the record to clearly reflect that through the eyes of the court, there is absolutely no issue regarding Mrs. Stewart's ability to participate cognitively or otherwise in these proceedings." (See *Parris v. Stewart (In re Lean*), *supra*, A124777.)

name a beneficiary who is otherwise prohibited by statute, such as a caregiver. Kaber understood that Patricia was near death, so he went to see her the morning after Davis contacted him. After Taylor left the room, Kaber interviewed Patricia, asking her about the dispositive provisions of her new will, including the exclusion of Deborah. Patricia had communication problems, but she could say "yes" and "no" and responded to him appropriately. Kaber questioned her in different ways to determine her intent based on the consistency of her responses. Kaber testified that he signed the certificate of independent review because he felt secure that Patricia understood the natural objects of her affection, the nature and extent of her bounty, and that the will was what she wanted to do. Kaber himself was a disinterested party. He had nothing to gain under the will and had no administrative capacity or prior relationship with any of the parties.

Finally, the legal secretary and the attorney who represented Patricia in the 2007 conservatorship proceeding testified that they visited Patricia in the hospital shortly before her death. During their visit, they had no concerns that Patricia lacked capacity because she recognized both of them and interacted with them appropriately.

The probate court ruled that the will was valid and operated to revoke all prior wills. As to Patricia's competence, the court found as follows: "[H]aving reviewed the medical records and the testimony of all the witnesses, it appears clear that Patricia Lean was competent to execute a Will in February of '09. And that she was well aware of her bounty, her property, her sister, her relatives. And so I'm going to find that she was competent to execute the Will, and it is valid." On the certificate of independent review, the court found: "It appears that everything was done appropriately. There was counseling. It was done in a confidential manner. And this was done independently by someone who was not involved at all with Ms. Lean prior to this time."

The probate court dismissed with prejudice Stewart's action to probate the April 2007 Will and rejected all creditor claims filed against Patricia's estate. Stewart appeals from the order dismissing his action for probate of the April 2007 will and from the

orders admitting the February 2009 Will to probate and denying his will contest.[9] This is appeal No. A148396.

D. Deborah Petitions to Revoke Probate of the February 2009 Will

On July 26, 2016, Deborah, represented by Stewart at the time, filed a petition under Probate Code section 8270 seeking to revoke probate of the February 2009 Will. In October, the probate court appointed Taylor as the executor of Patricia's estate. In December, Taylor filed a first and final accounting and petition for final distribution. Undeterred by the court's ruling that he lacked standing, Stewart filed objections to the petition for final distribution. Deborah filed a joinder to his objections.

On December 29, 2016, the probate court dismissed Deborah's petition, ruling that she "does not have the right to file a Will contest." The ruling followed argument from counsel for Taylor that under Probate Code section 8270, any person with actual notice of a will contest was required to join in that contest. Because Stewart filed his will contest in April 2009, and because Deborah had actual notice of the will contest but failed to join in it or file objections to the will, Deborah could not seek revocation in 2016. The court agreed and by minute order dismissed her petition. On June 23, 2017, Deborah filed a notice of appeal from the order dismissing her petition. This is appeal No. A151849.

E. The Jury Renders Verdict on Stewart's Breach of Contract Action

As noted above, a few months before Patricia's death, Stewart filed suit against her for breach of their alleged *Marvin* agreement. On April 30, 2009, Stewart filed a first

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[9] Stewart's civil case information statement includes a written narrative and attachment by which he seeks to expand his appeal to include various final orders by other Humboldt County Superior Court judges in addition to the orders listed in his notice of appeal. We need not address the matters set forth in the civil case information statement as it is not a part of the notice of appeal, and our jurisdiction extends only to orders identified in the notice of appeal. (Code Civ. Proc., § 906 [appellate court not authorized to review "any decision or order from which an appeal might have been taken," but was not]; see Cal. Rules of Court, rule 8.100(a) [notice of appeal must identify order appealed from]; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46–47 [no jurisdiction to review appealable order not identified in notice of appeal].)

amended complaint against the special administrator of Patricia's estate, praying for monetary damages and sole ownership of the Ranch. Stewart alleged that their *Marvin* agreement had been modified in August 1994 to provide that the Ranch "would become the sole property of the survivor upon the death of the other party," and "the survivor can never leave or sell that ranch until the last of the parties' mutual pets dies." These alleged modifications were never reduced to writing. Stewart further alleged that Patricia breached their agreement on October 30, 2007, by "repudiating the agreement and excluding plaintiff from the ranch and attempting to alienate the ranch and refusing to perform any of her obligations under the agreement and attempting to disinherit plaintiff."

In July 2009, Stewart moved for a preliminary injunction and sought a declaration that he had an immediate and exclusive right to possession of the Ranch. Rolff sought leave to intervene based on his interest as the holder of title to the Ranch. Taylor requested intervention based on his interest as a beneficiary of Patricia's estate. Both were granted leave to intervene. The trial court denied Stewart's motion for a preliminary injunction in October. We affirmed in *Stewart v. Parris I, supra*, A126382.

The jury trial commenced on December 28, 2015.[10] Stewart testified that he and Patricia entered into a nonmarital *Marvin* agreement in which he would give up his law practice and move to Humboldt County with Patricia, where they would share equally in their property and take care of each other until one of them died. After Patricia bought the Ranch, they agreed that the survivor would remain on the property until the last of their mutual pets had died. Stewart testified that they did not put the *Marvin* agreement in writing because they were in love and trusted each other. He testified that he fulfilled his part of the agreement to the best of his ability until he was ejected from the property

[10] The Honorable Marjorie Laird Carter, sitting by assignment, presided over the consolidated probate matters (Super. Ct. Humboldt County, 2009, Nos. PR090073, PR090102) as well as the breach of contract action (*Stewart v. Stewart* (Super. Ct. Humboldt County, 2008, No. DR081020).

in November 2007 following allegations of domestic abuse.[11] He denied ever physically or verbally abusing Patricia.

On cross-examination, Stewart admitted that Patricia bought the Ranch as a single woman in her own name, financing it entirely with money she had received from an inheritance. He conceded that Patricia's family trust annuity income was the couple's primary source of financial support and that he stopped working for income after the couple moved to the Ranch. Patricia's annuity income supported the couples' food and living expenses and compensated workers who helped out at the Ranch. The jury heard evidence that the Ranch's vineyard, which was operated by Stewart, generated virtually no revenue, roughly $7,000 over a six-year period, and always showed a loss on Patricia's and Stewart's tax records.

The jury also heard testimony that Stewart's law practice was unprofitable and already winding down before the couple's move to the Ranch. In seeking an award of spousal support during the divorce proceeding, Stewart declared: " 'It is almost irrelevant that respondent is a licensed attorney. In 1994 Respondent decided he would rather dig ditches in the rain than practice law.' " Stewart also testified that at the time of the alleged oral agreement, he had been a practicing attorney for nine or 10 years and was quite familiar with the statute of frauds.

On January 15, 2016, the jury reached its verdict. The verdict form required the jury to determine sequentially (1) whether Stewart and Patricia entered into an oral contract, (2) if a contract exists, whether it is enforceable or barred by the statute of frauds, (3) if the contract is enforceable, whether any party breached it. The jury found that he and Patricia had entered into an oral agreement, but that their oral contract, which involved real property, was subject to the statute of frauds. The jury then found that the doctrine of estoppel did not bar application of the statute of frauds because Stewart had not proven it would cause him unconscionable injury or result in the unjust enrichment of

[11] In 2007, Patricia was granted a three-year restraining order against Stewart. Over Stewart's counsel's objections, the trial court admitted the judge's findings in the restraining order proceeding, which include allegations of Stewart's abuse.

Patricia's estate. Because the jury found the contract unenforceable, it did not reach the question whether any party breached the agreement. On May 5, 2016, the trial court entered its judgment in the breach of contract action. Stewart has appealed from the judgment in appeal No. A148501 and from the order denying his posttrial motion to tax costs in appeal No. A150463.

DISCUSSION

I. Stewart's Appeal from the Probate Court Orders (Appeal No. A148396)

We briefly address, at the outset, Stewart's contention that Judge Carter, who tried both the probate and breach of contract actions, lacked jurisdiction because the matters had been previously assigned to a different judge of the Superior Court of Humboldt County. Stewart's reliance on California Rules of Court, rule 10.910(b) is misplaced. That rule merely addresses the assignment of civil cases for trial from a master calendar. Jurisdiction is a separate question, and is vested by the Constitution upon the superior court of a county, and not in any particular judge or department. (Cal. Const. art. VI, § 4; see *Williams v. Superior Court* (1939) 14 Cal.2d 656, 662 ["[W]hether sitting separately or together, the judges hold but one and the same court."].) Accordingly, Judge Carter was not deprived of jurisdiction merely because another judge of the superior court had been previously assigned to these matters.

A. *The Probate Court Correctly Determined that Stewart Lacked Standing to Contest Probate of the February 2009 Will*

"A party has standing to contest a will if that contestant is an 'interested person.' " (*Estate of Sobol* (2014) 225 Cal.App.4th 771, 781.) Probate Code section 48, subdivision (a)(1), provides: "Subject to subdivision (b), 'interested person' includes . . . [¶] . . . [a]n heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding." An interested person has also been defined as one who has "such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside." (*Estate of Land* (1913) 166 Cal. 538, 543.) "The requirement that the

contestant be an interested person prevents persons with no interest from delaying the settlement of the estate . . . ." (*Estate of Plaut* (1945) 27 Cal.2d 424, 429 (*Plaut*).)

As "*only* an interested person may properly be a contestant" (*Estate of Powers* (1979) 91 Cal.App.3d 715, 719, italics in original), a plaintiff must demonstrate he or she would take under another will or by intestacy in the event of a successful contest to the purported will. (*Id.* at p. 720.) "Interested persons" in the context of a will contest have included, for example, a decedent's heirs who take by intestate succession if a will is found invalid (see *Estate of Robinson* (1963) 211 Cal.App.2d 556; *Estate of Emery* (1962) 199 Cal.App.2d 22), contingent remaindermen under a testamentary trust (*Plaut, supra*, 27 Cal.2d 424), judgment lien creditors of a disinherited heir (*Estate of Harootenian* (1951) 38 Cal.2d 242 (*Harootenian*), and beneficiaries of a decedent's tax-liened life insurance policy (*Estate of Kovacs* (1964) 227 Cal.App.2d 308).

Stewart alleges in his second amended will contest that he is a person interested in Patricia's estate as her "surviving spouse" and as the named beneficiary of the April 2007 Will. In subsequent argument and on appeal, he contends that he also qualifies as an "interested person" by virtue of the assignment granted to him by Deborah, and because he is a creditor claiming entitlement to the entirety of Patricia's estate under his breach of contract action.

We conclude Stewart is not an "interested person" within the meaning of Probate Code section 48, subdivision (a)(1), as he would receive no benefit from revocation of the February 2009 Will. Even if that will were set aside, he could not take under the April 2007 Will because his marriage to Patricia was dissolved prior to her death on February 23, 2009. If after executing a will the testator's marriage is dissolved, the dissolution revokes the disposition of property made by the will to the former spouse. (See Prob. Code, § 6122, subd. (a); *Estate of Coleman* (2005) 129 Cal.App.4th 380, 389; see also Prob. Code, § 78, subd. (d).) Here, the family court dissolved the marriage between Patricia and Stewart on December 16, 2008, and entered judgment of dissolution on February 5, 2009, a judgment we affirmed on appeal. (*Parris v. Stewart (In re Lean*), *supra*, A124777.) Accordingly, Stewart cannot claim to have a beneficial interest in the

April 2007 Will or to be a surviving spouse; his arguments to the contrary are baseless and have been rejected by this court on several occasions.

Stewart also asserts he has standing to contest the will as a creditor, based on his breach of contract action. Unlike *Harootenian*, however, he was never a judgment lien creditor. He merely had a potential claim against Patricia's estate, a claim that had not been reduced to a collectable judgment. Moreover, a jury subsequently concluded that the *Marvin* agreement forming the basis of his action was unenforceable under the statute of frauds, a finding which we will affirm later in this opinion. Stewart therefore cannot claim standing under a judgment creditor theory.

Finally, Stewart contends he acquired standing through the assignment of rights in December 2014 from Deborah, the sole surviving heir to Patricia's estate. Courts have recognized that assignees of an heir's rights are entitled to contest the will of a decedent that the heir would have been entitled to contest. (See *Estate of Clark* (1928) 94 Cal.App. 453, 460 [finding that the right of action to contest a will is assignable because " 'a contest of a will is in its essence an action for the recovery of property unlawfully taken or about to be taken from the ownership of the contestant' . . . [citation] [and an] 'action arising out of the violation of a right of property . . . may be transferred by the owner.' "].)

An assignment, however, cannot confer to the assignee rights that the assignor does not herself possess under law. An assignment "merely transfers the interest of the assignor. The assignee 'stands in the shoes' of the assignor, taking his or her rights and remedies, subject to any defenses that the obligor has against the assignor prior to notice of the assignment." (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 758, p. 809; see *Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096 [an assignment carries with it all the rights of the assignor]; *Teater v. Good Hope Development Corp.* (1942) 55 Cal.App.2d 459, 462 [enforcement of assignor's rights by assignee depends upon rights of assignor].) As discussed in section II.B, *post*, Deborah forfeited her right to challenge the February 2009 Will when, having actual notice of Stewart's will contest in 2009, she failed to join in that contest or otherwise timely object

to the probate of the will. Stewart could not assert a right to maintain a will contest that Deborah did not herself possess at the time she assigned her rights to him in 2014.

We conclude the probate court correctly determined that Stewart did not have standing to contest the February 2009 Will and therefore affirm the orders disallowing his contest and admitting the will to probate. As a consequence of these orders, the court properly dismissed Stewart's petition to probate the earlier April 2007 Will.

B. *Substantial Evidence Supports the Court's Determination that the February 2009 Will Was Validly Executed*

Even if the probate court's dismissal of Stewart's will contest was in error, we may still affirm the court's orders on appeal, because substantial evidence supports the court's determination, following a hearing, that the February 2009 Will was validly executed and operated to revoke all prior wills. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481 ["the appellate court should affirm the judgment of the trial court if it is correct on any theory of law applicable to the case, including but not limited to the theory adopted by the trial court"]; *In re Estate of Beard* (1999) 71 Cal.App.4th 753, 776 ["If the decision of a lower court is correct on any theory of law applicable to the case, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the lower court reached its conclusion." (Italics omitted.)].)

In reviewing the probate court's finding that Patricia had the capacity to execute the February 2009 Will, we apply a substantial evidence standard of review. (*Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1678.) "In our review for substantial evidence, we look at the evidence in support of the successful party, disregarding the contrary showing. [Citation.] All conflicts in the evidence are resolved in favor of the respondent. All legitimate and reasonable inferences are indulged in order to uphold the verdict if possible." (*Ibid*.)

Probate Code section 6100.5 specifically applies to the mental capacity necessary to make a will: "(a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true: [¶] (1) The individual does not have

sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will. [¶] (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done."

" '[T]estamentary capacity involves the question of whether, at the time the will is made, the testator " 'has sufficient mental capacity to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property and to remember, and understand his relations to, the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument.' " [Citations]. It is a question, therefore, of the testator's mental state in relation to a specific event, the making of a will.' " (*Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 727.)

Substantial evidence supports the probate court's determination that Patricia had testamentary capacity at the time the will was executed. Hospital records from treating physician Dr. Fratkin disclosed that Patricia was alert, oriented, and in no acute distress prior to her death. Testimony from her attorney Davis established that Patricia not only understood the nature of the testamentary act but provided reasons for excluding her sister Deborah from the will, which included Deborah's lack of contact and failure to visit Patricia in the hospital. Patricia understood the nature of her property, what was being bequeathed, and to whom. According to Davis, Patricia seemed "clear and lucid" in her wishes. His testimony was corroborated by others who knew Patricia, including her former attorney and legal secretary. Both visited Patricia in the hospital and testified that she recognized them and interacted with them appropriately. They expressed no concern that Patricia lacked capacity. All of these interactions took place in the same time frame in which the will was made.

Stewart contends that his exclusion from the hearing rendered it a "sham" proceeding and that whatever evidence was admitted was not competent to establish Patricia's testamentary capacity. His participation, he argues, would have permitted conflicting testimony from Dr. Guetzkow to be introduced. We are not persuaded. The record establishes that Dr. Guetzkow had seen Patricia when she was first admitted to the hospital, but had little contact with her thereafter. In contrast, Dr. Fratkin followed Patricia's case and had multiple contacts with her and, as his medical notes indicated, found her to be alert and oriented. Counsel for the special administrator received a letter from Dr. Gueztkow regarding Patricia's capacity and found that it contradicted the medical records. But when county counsel followed up with specific questions as to those inconsistencies, Dr. Guetzkow was nonresponsive. Dr. Guetzkow's letter was ultimately not admitted into evidence, and one may reasonably infer that the court found Dr. Guetzkow's testimony would be of limited value in the face of substantial evidence of Patricia's testamentary capacity. But even if such evidence had been allowed, it is of no consequence. A reviewing court may not reweigh the evidence but will uphold a judgment that is supported by substantial evidence, even if substantial evidence to the contrary is also present. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

We also uphold the probate court's determinations concerning the certificate of independent review. Former Probate Code section 21350—the provision in effect at the time of the executed will—precluded care custodians "from being beneficiaries of testamentary transfers from dependent adults to whom they provide care services, as well as barring similar transfers to other 'disqualified persons.' " (*Estate of Winans* (2010) 183 Cal.App.4th 102, 113; see Prob. Code, § 21380, subd. (a)(3).)[12] The ban is avoided,

[12] At least one appellate court has held that "even though Probate Code former section 21350 et seq. has been repealed and replaced by Probate Code section 21380 et seq., which applies only to instruments executed on or after January 1, 2011, Probate Code former section 21350 et seq. still governs an instrument executed before January 1, 2011." (*Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128, 1131.)

however, if a " 'certificate of independent review' is prepared with respect to the transfer." (*Estate of Winans*, at p. 114; see Prob. Code, § 21384.)

An attorney preparing a certificate of independent review is required "to ensure the testator understands (1) the nature of the property bequeathed; (2) that a disqualified person will receive the property; and (3) that the 'natural objects' of the testator's bounty, if any, will not receive the property. The certifying attorney must also ensure the testator voluntarily intends this result and does not believe himself or herself to be under any compulsion, whether legal, financial or otherwise, to make the bequest." (*Estate of Winans, supra,* 183 Cal.App.4th at p. 117.) An attorney signing the certificate of independent review must also aver that he or she counseled the transferor outside the presence of any heir or proposed beneficiary, and that the attorney acted impartially. (Former Prob. Code, § 21351, subd. (b); see Prob. Code, § 21384, subd. (a).)

As a matter of first impression, we hold that the probate court's determination whether a certificate of independent review complies with Probate Code section 21384 is reviewed for substantial evidence. Such inquiry is necessarily fact-bound and requires an evaluation of the confidentiality of the consultation, the certifying attorney's impartiality, and the transferor's understanding as to the nature of the intended bequest and his or her free will in making it. We will uphold the probate court's determination unless, viewed in the light of the entire record, it is so lacking in evidentiary support as to render it unreasonable.

Substantial evidence supports the finding that Kaber provided Patricia with the necessary confidential counseling and that she understood the consequences of her bequest to Taylor, particularly as to the impact on Deborah. Taylor, the intended beneficiary, was excluded during the counseling sessions and Davis was present only to facilitate Kaber's interview. Kaber testified that he questioned Patricia in several different ways to ensure that her responses were consistent and expressed a clear purpose. Although Patricia appeared to communicate in single-word answers, Kaber testified he felt secure that Patricia understood the nature and extent of her bounty, responded appropriately to his questions, and made clear that the changes to her will were voluntary

and what she truly wanted. Kaber also established that he was a disinterested party who had no prior relationship with any of the parties and no interest in Patricia's estate apart from his desire to help her realize her bequests. Crediting Kaber's testimony, the probate court found that "everything was done appropriately. There was counseling. It was done in a confidential manner. And this was done independently by someone who was not involved at all with Ms. Lean prior to this time."

In short, even though the probate court did not permit Stewart to proceed with his will contest, the February 2009 Will was subjected to careful scrutiny by the court and found to be valid and enforceable. Substantial evidence supports the court's determination that Patricia was competent to execute the will in favor of Taylor and that she did so knowingly, voluntarily, and with appropriate counseling from a disinterested attorney. We therefore affirm the probate court's orders admitting the February 2009 Will to probate and dismissing Stewart's petition to probate the earlier, revoked will. We need not address Stewart's remaining arguments in this appeal.

II. Deborah's Appeal (Appeal No. A151849)

We must first determine whether Deborah has standing to appeal the probate court's order dismissing her petition to revoke probate of the February 2009 Will.[13] In light of her assignment of rights to Stewart, we conclude she does not.

A. Deborah's Assignment of Rights Deprives Her of Standing to Appeal

Whether a party has standing to appeal is a question of law. (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299.) An appeal may be taken on an appealable order or judgment, but only by those who have

[13] Taylor contends that Deborah's notice of appeal was untimely because it was not filed within 60 days from entry of the court's minute order dismissing her petition. It does not appear that a notice of entry of judgment or a file-endorsed copy of the order was ever served on Deborah. (See Cal. Rules of Court, rule 8.104(a)(1); *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905 [requiring strict compliance with rule 8.104(a)(1) for the 60-day notice of appeal deadline to apply].) Deborah thus timely filed her notice of appeal within 180 days after entry of the court's judgment. (Cal. Rules of Court, rule 8.104(a)(1)(C).)

standing to appeal, which question is jurisdictional and cannot be waived. (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947; *Marsh v. Mountain Zephyr, Inc*. (1996) 43 Cal.App.4th 289, 295.)

"Not every party has standing to appeal every appealable order. Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal." (*In re K.C.* (2011) 52 Cal.4th 231, 236.) "One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. [Citations.] Appellant's interest ' "must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." ' " (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) In probate matters, standing to appeal requires that a party "hav[e] an interest recognized by law in the subject matter of the judgment, which interest is injuriously affected by the judgment . . . ." (*Estate of Colton* (1912) 164 Cal. 1, 5.)

Deborah contends she is an "interested person" within the meaning of Probate Code section 48 because she is the sole surviving heir and a person identified by statute as having priority for appointment of a personal representative. (See Prob. Code, § 8461, subd. (f).) While that normally would suffice to establish standing, Deborah assigned her rights to Stewart, including her right to contest any will signed by Patricia. The question then is whether this assignment deprives her of standing to maintain an appeal.

An assignment of a chose or thing in action is defined as "a right to recover money or other personal property by a judicial proceeding." (Civ. Code, § 953.) "Choses in action are assignable when they arise out of an obligation or out of the violation of a right of property." (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 740, p. 795; see Civ. Code, §§ 954, 1458.) Of concern here, an assignable right includes the right of an heir to contest a will. (*Estate of Clark, supra*, 94 Cal.App. at p. 460). Once assigned, the assignee is the owner of the claim and has the right to sue on it. Conversely, an assignment deprives the assignor of standing to sue on the claim. (*Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co*. (2011) 191 Cal.App.4th 1394, 1402; see *Purcell v. Colonial Ins. Co.* (1971) 20 Cal.App.3d 807, 814 [plaintiff's

assignment of right to recover from insurer barred his later cause of action for tort damages].)

Deborah executed an assignment in December 2014 granting to Stewart *all* her rights as the sole intestate heir of Patricia's estate. Her assignment divested her of any interest in the estate and is fatal to her appeal. Having no interest, and particularly after assigning away her right to "contest any will signed by . . . Patricia," Deborah cannot now claim to be aggrieved by the lower court's order dismissing her petition challenging the probated will.

Relying on *Plaut*, Deborah contends that a person may petition to revoke a will even after executing an assignment. *Plaut* is inapposite as the case did not involve an assignment of rights to an estate. In any event, her argument misconstrues the opinion, which stated that standing "should not be denied a person who, even though he may ultimately not receive any part of the estate, *has at least established a prima facie interest in that estate*." (*Plaut*, *supra*, 27 Cal.2d at p. 428, italics added.) Deborah cannot establish a prima facie interest in the estate when it is undisputed that she assigned away her rights to it. Deborah also argues that she reserved for herself the right to nominate a personal representative, and this residual right gives her standing to appeal. We need not resolve whether Deborah's assignment was complete or partial because as to the matter at hand, the right to contest a will, there is no question that she assigned *that* right away.

B. Deborah Forfeited Her Right to Challenge the Probated Will by Failing to Join in the Earlier Will Contest

Although we conclude that Deborah's appeal must be dismissed for lack of standing, we must resolve a separate question as to the effect of Deborah's assignment of rights to Stewart in December 2014. For if Deborah has no standing to appeal the dismissal of her petition to revoke probate of the admitted will, how is it that Stewart also lacked standing to pursue a will contest? The answer lies in the requirements of Probate Code section 8270, subdivision (a), which does not permit interested parties to take a

wait-and-see approach to a will contest and then file a revocation petition when the earlier contest is not resolved in their favor.[14]

In *Estate of Meyer* (1953) 116 Cal.App.2d 498, 500–501, the court traced the history and purpose of former Probate Code section 380, the predecessor statute to section 8270: "Prior to 1929 the Code of Civil Procedure relating to contests of wills provided as to postprobate contests that when a will had been admitted to probate any person interested might contest the same; in 1929 the Legislature enacted the qualifying provisions recited above excluding from the interested persons who might contest after probate those who had been parties to preprobate contests or had had actual knowledge thereof in time to have joined therein. Under the older provisions it often happened that persons entitled to contest wills would, instead of joining in a preprobate contest, withhold their contest until such contest had been determined, benefiting equally with the contestants if the will were defeated, and reserving to themselves a second chance to have the will invalidated by postprobate contest."

As the court explained, the legislative purpose behind enactment of Probate Code section 380 was to discourage procedural gamesmanship by interested parties who have actual notice of a will contest but wait to see how those proceedings are decided before joining in the fray, and in effect getting a second bite at the apple. "We think the amendatory legislation was aimed exclusively at those who had full opportunity to contest before probate but preferred to be dilatory, waiting to see what might happen and then filing their contests after probate if disappointed in the outcome of the first contest." (*Estate of Meyer*, *supra*, 116 Cal.App.2d at p. 501.)

In 1988, former Probate Code section 380 was repealed and replaced by Probate Code section 8270, leaving intact the rule that an interested party with actual notice of a

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[14] Probate Code section 8270, subdivision (a) provides as follows: "Within 120 days after a will is admitted to probate, any interested person, other than a party to a will contest *and other than a person who had actual notice of a will contest in time to have joined in the contest,* may petition the court to revoke the probate of the will." (Italics added.)

will contest who fails to join in that contest is barred from later petitioning to revoke probate of the admitted will. (Stats. 1988, ch. 1199, § 42, p. 3898 [repealing section 380]; § 81.5, p. 3940 [adding section 8270].) Section 8270 was among a set of reforms proposed by the California Law Revision Commission to "streamline[], modernize[], clarifi[y], and improve[] various aspects of California probate law." (Sen. Com. On Judiciary, analysis of Assem. Bill No. 2841 (1988-1989 Reg. Sess.) (Mar. 2, 1988, p. 8.) With respect to Probate Code section 8270, the California Law Revision Commission's comments reflected that "[s]ubdivision (a) of Section 8270 restates the first and second sentences of former Section 380 but omits reference to some of the specific grounds of opposition." (Recommendation Relating to Opening Estate Administration (Oct. 23, 1987) 19 Cal. Law Revision Com. Rep. (1988) pp. 787, 824–825 (1988)).[15] In other words, the intent of Probate Code section 8270, subdivision (a), was to restate but not alter the longstanding rule articulated in former Probate Code section 380 and analyzed in *Estate of Meyer*. (See *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148 ["Because the official comments of the California Law Revision Commission 'are declarative of the intent not only of the draftsman of the code but also of the legislators who subsequently enacted it' [citation], the comments are persuasive, albeit not conclusive, evidence of that intent."].)

Cases have developed an exception to this rule. A voluntary dismissal of a will contest before there has been a trial on the merits does not preclude interested parties from later petitioning to revoke probate of an admitted will. In *Estate of Hoover* (1934)

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[15] Former Probate Code section 380 reads: "When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, within 120 days after the date the court admits the will to probate as recorded in the minutes by the clerk pursuant to the provisions of Section 322 of this code, contest the same or the validity of the will. For that purpose, he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate be revoked." (Former Prob. Code, § 380, added by Stats 1931, ch. 281, § 380; amended by Stats. 1969, ch. 124, § 1; amended by Stats. 1977, ch. 217, § 1.)

139 Cal.App. 753 (*Hoover*), the decedent's daughter filed a preprobate will contest, but voluntarily dismissed the contest before a hearing, without prejudice. After the proposed will and codicils had been admitted to probate, she filed a postprobate petition to revoke the will and codicils on substantially the same grounds as were alleged in the earlier will contest. (*Id*. at p. 755.) Her petition was challenged on the basis that she had already been a party to a preprobate will contest. In rejecting that challenge, the court stated, "Without question where the contest before probate has been 'determined adversely' it is the intent of [former] section 380 of the Probate Code to prevent another contest after probate. However, where, like in the case at bar, the contest before probate has been dismissed by the contestant before any trial of the issues of the contest . . ., it does not preclude a contest after probate . . . ." (*Id.* at p. 759; see *Estate of Cook* (1928) 205 Cal. 581, 587 [a voluntary dismissal of a will contest is not a bar to a subsequent action instituted upon the same cause of action].)

Unlike *Hoover*, however, the will contest filed by Stewart was *not* voluntarily dismissed. It was dismissed following the probate court's determination that he lacked standing to maintain it. Deborah argues that the will contest was never adjudicated on the merits and therefore a postprobate challenge should have been allowed. (*Hoover*, *supra*, 139 Cal.App. at p. 760; see *Estate of Moss* (2012) 204 Cal.App.4th 521, 540 [court's failure to adjudicate preprobate contests or otherwise provide any trial on contestants' objections to will was in error].)

We conclude that the facts presented here align more closely to the procedural mischief described in *Estate of Meyer* that Probate Code section 8270 is intended to foreclose. Deborah had actual notice of the April 2007 will contest filed by Stewart, Taylor's demurrer, and Stewart's amended will contests, but never joined in any preprobate contest. It was only after Stewart's will contest had been dismissed for lack of standing, and the will admitted to probate, that Deborah decided to challenge the will in 2014. Stated another way, Deborah "had full opportunity to contest before probate but preferred to be dilatory, waiting to see what might happen and then filing [her] contest[] after probate if disappointed in the outcome of the first contest." (*Estate of Meyer*, *supra*,

116 Cal.App.2d at p. 501.) Her wait-and-see tactics are distinguishable from the plaintiffs in *Hoover* and *Estate of Moss*, who filed timely preprobate contests and sought diligently to have their objections heard by the court. At the end of the day, had Deborah joined in the will contest in a timely manner, Stewart's dismissal would not have been a bar to Deborah maintaining the will contest in her own right.

The other significant factor distinguishing this appeal from *Hoover* and *Estate of Moss* is that there *was* a hearing on the merits—the probate court's trial on the validity of the February 2009 Will. Even in the absence of a will contest, the court carefully examined the same issues raised in the will contest concerning Patricia's testamentary capacity, undue influence, and the certificate of independent review. We have concluded that substantial evidence supports the court's determination that the will was validly executed. (See *ante*, § I.B.) A successive trial covering the same issues would accomplish nothing. (See *Hoover*, *supra*, 139 Cal.App. at p. 760 [the provisions of former Probate Code section 380 "are intended merely as a prohibition against two successive trials of the same issue"]; compare *Estate of Moss*, *supra*, 204 Cal.App.4th at pp. 539–540 [plaintiff's objections to validity of will were never adjudicated on the merits].)

We conclude that Deborah forfeited her right to challenge the February 2009 Will under Probate Code section 8270, subdivision (a) when, having actual notice of Stewart's will contest in 2009, she failed to join in that contest or otherwise timely object to the probate of the will. By the time Deborah assigned her rights to Stewart in December 2014, she could not assign to him a right she no longer possessed. (See discussion *ante*, § I.A.) The probate court correctly held that Deborah's assignment, while valid, did not confer on Stewart standing to maintain a will contest. Deborah's own dilatory petition was properly dismissed.

III. Stewart's Appeals from his Breach of Contract Action (Appeal Nos. A148501 & A150463)

On January 15, 2016, the jury returned a verdict in the breach of contract action, finding that Stewart and Patricia had entered into a *Marvin* agreement, but that the

contract was unenforceable under the statute of frauds. Stewart raises a host of claims on appeal, which we address below in four categories: pretrial challenges, evidentiary rulings at trial, the jury's verdict, and posttrial motions. We conclude that Stewart's claims lack merit and affirm.

A. Pretrial Challenges

i. Taylor's Intervention

Stewart first asserts that the trial court erred in allowing Taylor to intervene in the breach of contract action. Taylor filed a complaint in intervention on October 1, 2009, and participated in the trial. We review a trial court's ruling on a motion to intervene for abuse of discretion. (*Kuperstein v. Superior Court* (1988) 204 Cal.App.3d 598, 600–601.)

"Intervention is mandatory (as of right) or permissive. A nonparty has a right under Code of Civil Procedure section 387, subdivision (b) to intervene in a pending action 'if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties.' " (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 547; see Code Civ. Proc., § 387, subd. (d) [application for mandatory intervention must also be "timely"].) The "interest" must be "of such direct or immediate character, that the intervener will either gain or lose by the direct legal operation and effect of the judgment." (*Knight v. Alefosio* (1984) 158 Cal.App.3d 716, 720.)

Taylor claims an interest in the subject of this action as a beneficiary of Patricia's estate. Had Stewart prevailed on his claim, the estate would be left with no assets, thus Taylor had a "direct or immediate interest" in the case.[16] The intervention falls squarely within the parameters of mandatory intervention, in that Taylor "claims an interest

[16] Taylor also argues his interests could not be adequately represented by the special administrator of Patricia's estate. His argument is well taken. The special administrator did not have a stake in the outcome of this case.

relating to the property or transaction that is the subject of the action." (Code Civ. Proc., § 387, subd. (d)(1)(B).)

Stewart's reliance on *Hausamnn v. Farmers Insurance Exchange* (1963) 213 Cal.App.2d 611, 614–615) is inapt. That case involved a suit arising from an automobile accident in which an insurance company sought to intervene as a prospective subrogee. (*Id*. at p. 612.) The case has no bearing on the right of a beneficiary to an estate to intervene in a matter potentially affecting the entirety of his inheritance. A case does not stand for a proposition neither discussed nor analyzed. (*DCM Partners v. Smith* (1991) 228 Cal.App.3d 729, 739.) We find no error in Taylor's intervention.

ii. Patricia's Unverified Answer

Stewart claims the responding parties should not have been allowed to present evidence and judgment should have been entered in his favor because Patricia's original answer was not verified. He concedes that he did not file a demurrer, move to strike the answer, or move to exclude evidence on that basis. His argument is therefore forfeited on appeal. (*Estate of Westerman* (1968) 68 Cal.2d 267, 279 (*Westerman*) [issues not presented to the trial court cannot be raised for the first time on appeal].)

Stewart also claims the trial court committed reversible error by allowing the special administrator to amend the answer to add the defense that Stewart had committed a breach of contract. This claim is not supported by citation to applicable authority and we therefore need not address it. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 (*Badie*).)

iii. Discovery Was Not Reopened by Resetting the Trial Date

On July 14, 2011, the trial court filed its order denying Stewart's request for an order compelling Rolff to respond to a set of special interrogatories. Stewart contends the lower court erred in refusing to reopen discovery after the initial trial date had been vacated. Code of Civil Procedure section 2024.050, subdivision (a), provides, in relevant part: "*On motion of any party*, the court may grant leave . . . to reopen discovery after a

new trial date has been set." (Italics added.) Stewart does not allege that he filed a motion under this section.

It is a basic principle of appellate review that a trial court cannot be faulted for not ruling on a motion that is never made. "As a general rule an appellate court will consider only such points as were raised in the trial court, and this rule precludes a party from asserting, on appeal, claims to relief not asserted or asked for in the court below." (*Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 505; cf. *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1093 ["It is fundamentally unfair to fault a trial court for a reason it never had an opportunity to consider."].) Stewart's claim of error is thus forfeited on appeal. Further, we would deem any such error harmless as he does not satisfactorily explain how the discovery he sought would have affected the outcome of this case. The evidence Stewart sought would have gone to Rolff's claim to quiet title, a claim Stewart admits was abandoned during the proceedings.

B. Admissibility of Evidence at Trial

Trial courts have broad discretion over the admission or exclusion of evidence at trial, and we review the court's determinations under the deferential abuse of discretion standard. (*Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 107–108 (*Continental*); *People v. Williams* (1997) 16 Cal.4th 153, 197; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 885.) That standard requires that we overturn the court's ruling only upon a showing of a " ' "clear case of abuse" ' " and " ' "a miscarriage of justice." ' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) Further, a party must show any evidentiary error to be prejudicial, as "[w]e can reverse a judgment based on the erroneous admission of evidence only if it is reasonably probable that the appellant would have obtained a more favorable result absent the error, so the error resulted in a miscarriage of justice." (*Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 748.)

i. Exclusion of Testimony from Stewart's Appraiser

Stewart asserts the trial court wrongly excluded testimony of his expert witness as to the fair market value of the Ranch. Expert testimony may be excluded if irrelevant

(Evid. Code, §§ 210, 350-352), improper (*id.*, § 801), or "its probative value is substantially outweighed by the probability that its admission [would] (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" (*id.*, § 352). The trial court excluded the appraiser's testimony on the basis that it might be relevant to the probate actions but had no bearing on the breach of contract action.

Stewart claims testimony as to the value of the Ranch would be relevant because a higher value would support a finding of unjust enrichment or unconscionable injury. The relevance would have been marginal, at best. Even if the Ranch had increased in value since Patricia purchased it in 1994, the increase would not necessarily be attributable to Stewart's conduct. We cannot say the trial court's failure to admit this testimony was a "clear" abuse of discretion or resulted in a miscarriage of justice.

ii. Notices to Appear

Stewart served notices to appear and produce certain documents at trial. Both Taylor and Rolff filed objections. Rolff contends that the notices sought 17 categories of documents, including requests for Patricia's medical bills, bank books or registers, the purchase contract between Rolff and Patricia, deed of trust, and other categories irrelevant to the breach of contract action. The trial court ruled that the documents did not need to be produced "until they become relevant."

A trial court's broad authority over the admissibility of evidence includes the discretion to regulate the order of proof and determine the relevance of any evidence. (Evid. Code, §§ 320, 350; *Continental*, *supra*, 32 Cal.App.4th at pp. 107–108; see Evid. Code, § 210 [" 'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."].) The trial court here found that the documents sought were not relevant to the issues to be tried, leaving open the possibility that such documents could become relevant at a later point. Stewart does not explain how the documents were even remotely relevant to whether a *Marvin*-style agreement had been formed or was enforceable. Nor does he

argue that the documents ever became relevant during the course of trial. We find no abuse of discretion.

iii. The Deed to Rolff

Stewart asserts the trial court erred in denying his motion to exclude the deed documenting the transfer of the Ranch to Rolff, claiming the deed is void. However, he does not allege that the deed was ever actually admitted into evidence and does not challenge Rolff's standing to have intervened in the case. Nor does he explain how the deed had any bearing on the *Marvin* agreement issue or estoppel to assert the state of frauds. We treat the argument as forfeited. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784–785.)

iv. Denial of Stewart's Motion in Limine to Exclude Evidence of Abuse

Stewart advances numerous instances of alleged error in the admission of evidence after the trial court denied his motion in limine to exclude certain prior judgment, orders, testimony, and documents pertaining to his alleged abuse of Patricia.

It appears the trial court did not grant or deny Stewart's motion in limine outright. Instead, it stated it would decide the evidentiary issues on a case-by-case basis, depending on what the parties chose to introduce. While Stewart alleges that the admission of certain exhibits was prejudicial, he does not explain how the evidence relates to the jury's findings. For example, he emphasizes that opposing counsel repeatedly referred to evidence of his alleged abuse of Patricia during closing argument. However, as he himself notes, the jury found he *had* proven both the existence and the terms of the *Marvin* contract. Evidence concerning abuse went to the question of whether Stewart breached his own obligations under the *Marvin* agreement by mistreating Patricia—an issue the jury had no occasion to decide when it found the contract unenforceable under the statute of frauds.[17] Stewart also argues the trial court

[17] Stewart concedes that he did not object to counsel's closing arguments at trial. His claim as to this objection is waived on appeal. (*Westerman*, *supra*, 68 Cal.2d at p. 279). We reject Stewart's contention that counsel's argument was so egregious that it

erred in refusing to admit an Adult Protective Services report offered to show that allegations of abuse by Stewart were a "recent fabrication." Again, the point is irrelevant as the jury did not reach the issue of substantial performance. No prejudicial error can be found as there is no reasonable probability that Stewart would have obtained a different verdict had the evidence of abuse not been admitted.

C. Challenge to the Jury Verdict[18]

i. Verdict Form

Stewart contends that the special verdict form was hopelessly deficient and resulted in an ambiguous and contradictory verdict. Respondents contend that Stewart has failed to preserve this claim for appeal because he did not object to the proposed verdict form before the jury was discharged. We agree.

"Failure to object to a verdict before the discharge of the jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected." (*Henrioulle v. Marin Ventures, Inc*. (1978) 20 Cal.3d 512, 521; see *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530 ["A party who fails to object to a special verdict form ordinarily waives any objection to the form."].) Stewart reviewed the special verdict form and did not raise any objections before it was presented to the jury. He had every opportunity to object to any perceived deficiencies in the verdict form or to seek clarification of the verdict after the jury returned its verdict and was polled. If there was any ambiguity associated with the verdict, that was the time to raise it. He may not do so for the first time on appeal.

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could not have been cured by a corrective instruction to the jury. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 892.)

[18] Stewart argues the jury was improperly instructed that a *Marvin* agreement must be proved by clear and convincing evidence, and that other instructional errors were committed. It is puzzling that he would press this claim, as the jury found *for him* on the existence of a *Marvin* agreement. In any event, Stewart concedes that he did not raise these objections before the trial court. They are waived. (*Westerman*, *supra*, 68 Cal.2d at p. 279).

Even if Stewart had preserved this issue for appeal, we would conclude that the jury's verdict was unambiguous. (See *Mixon v. Riverview Hospital* (1967) 254 Cal.App.2d 364, 375 ["[I]f the verdict is hopelessly ambiguous, hopelessly inconsistent or incomprehensible, a reversal is required."].) The special verdict form follows a clear and logical progression, and the jury followed it. The verdict form was drafted to address, first, whether an oral contract was created; second, whether that contract was enforceable or was barred by the statute of frauds; third, whether there was a breach of the contract, but only if the jury previously found an enforceable agreement. The jury found that Stewart and Patricia entered into a *Marvin* agreement, but that their oral contract, which involved real property, was subject to the statute of frauds. The jury next found that estoppel principles of unconscionability and unjust enrichment did not apply to take the contract out of the statute of frauds. Because the contract was found unenforceable under step two, there was no need for the jury to address any issues relating to breach of the agreement by either party.

We conclude there is no ambiguity as to the special verdict form or the verdict returned by the jury. We reject Stewart's unsupported contention that the jury's result was inconsistent because it found that a contract existed and yet also found that the estate would not be unjustly enriched or Stewart unconscionably injured by application of the statute of frauds. Each inquiry undertaken by the jury is supported by well-established authorities. Because Stewart's partial motion for retrial is based on the same failed arguments, we affirm the trial court's denial of his motion and deny Stewart's separate request for findings pursuant to Code of Civil Procedure section 909.

ii. Sufficiency of the Evidence

Stewart challenges the jury's determination that equitable estoppel did not bar application of the statute of frauds to the *Marvin* agreement. We conclude the jury's verdict is supported by substantial evidence. (*Irving Tier Co. v. Griffin* (1966) 244 Cal.App.2d 852, 861 (*Irving Tier Co*.).)

An oral agreement to transfer an interest in real property is invalid under the statute of frauds. (Civ. Code, § 1624, subd. (a)(3).) However, a defendant may be

estopped from relying on the statute of frauds as a defense if failure to enforce the oral contract would result either in unconscionable injury to the plaintiff or unjust enrichment to the defendant. "In the leading case on the subject, Justice Traynor wrote: 'The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract . . . .' (*Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 623 [(*Monarco*)].] The equitable principles set forth in *Monarco* have been echoed in many subsequent cases and are well settled. [Citations.] Whether the doctrine of equitable estoppel should be applied in a given case is generally a question of fact." (*Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1068, fn. omitted.) A factual finding on this point, "if supported by substantial evidence, will not be disturbed on appeal unless the contrary conclusion is the only one to be reasonably drawn from the facts." (*Irving Tier Co.*, *supra*, 244 Cal.App.2d at p. 861.)

The jury was instructed on the statute of frauds as follows: "Every State including California has a law known as the Statute of Frauds that generally requires that an agreement to buy, sell or change the ownership of real property must be in writing. [¶] Where the contract was oral, the plaintiff must prove by a preponderance of the evidence that the defendant is estopped from reliance upon the Statute of Frauds because failure to enforce the contract would result in either unconscionable injury to the plaintiff or unjust enrichment of the defendant."[19]

During deliberations, the jury asked for a definition of the word "estopped." The trial court instructed: "Estoppel means that a party is prevented by his own acts from claiming a right to the detriment of other party who was entitled to rely on such conduct

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[19] While Stewart objected to Rolff's proposed statute of frauds instruction, the final version of the subject instruction included language he proposed in his objection. Moreover, as noted *ante*, Stewart personally approved the verdict form after being given the opportunity for a final review.

and has acted accordingly." The jury also asked for the definition of "unconscionable" in reference to unconscionable injury. The jury was told the term means "[e]xtreme unfairness." Stewart does not challenge the court's definitions.

Unconscionable injury results from denying enforcement of a contract "after one party has been induced by the other seriously to change his position in reliance on the contract." (*Monarco*, *supra*, 35 Cal.2d at p. 623.) Substantial evidence supports the jury's finding that Stewart did not suffer such injury. Stewart testified that his legal practice was winding down *before* he entered into the agreement with Patricia. He stated that in 1992, he wound down his legal practice in Berkeley to work on a criminal defense matter for which he was never formally retained and from which he never made any money. The jury also heard evidence he was ineligible to practice law from July 19, 1993, to March 30, 1994, due to his failure to complete mandatory continuing legal education requirements. It was also revealed that during his divorce proceedings, Stewart sought spousal award payments from Patricia, declaring that " '[i]t is almost irrelevant that respondent is a licensed attorney. In 1994 Respondent decided he would rather dig ditches in the rain than practice law.' " Stewart concedes that Patricia's family trust annuity income was their primary source of financial support, and that he stopped working for income after the couple moved to the Ranch. In short, the evidence at trial was sufficient for the jury to find that Stewart was not induced to his detriment to wind down his legal practice and move to the Ranch, and to conclude that denying enforcement of the contract would not result in extreme unfairness to him.

As for unjust enrichment, while Stewart tended to a vineyard on the Ranch, the jury heard evidence that the business generated virtually no revenue and operated at a loss every year. Patricia's separate property annuity income supported the couple's living expenses, the work performed by others on the Ranch, and all the mortgage payments. No doubt, Stewart contributed to the household by caring for Patricia in her illness and tended to matters on the Ranch. But substantial evidence supports the determination that he received much in return and the estate would not be unjustly enriched by applying the statute of frauds to the *Marvin* contract. We may overturn the

jury's verdict only if a "contrary conclusion is the only one to be reasonably drawn from the facts." (*Irving Tier Co.*, *supra*, 244 Cal.App.2d at p. 861.) Stewart has not overcome this exceedingly high bar.[20]

Finally, Stewart asserts the jury's finding on the doctrine of equitable estoppel was merely advisory and argues that the trial court failed to rule on the estoppel issue itself, citing to *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54.) *DRG* is distinguishable. There the estoppel issue was not resolved by the special verdict or addressed on the merits by the trial court. (*Id.* at p. 61.) Here the trial court entered its judgment based on the jury's special verdict form, impliedly adopting the jury's conclusion that defendants should be estopped from asserting the statute of frauds as a defense. We find no error.

D. Posttrial Motion to Tax Costs

Stewart's motion to tax and strike costs was denied by an order dated July 25, 2016. Stewart has appealed from this order.

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[20] Stewart urges us to reverse based on the care he provided for Patricia, the farm, and the animals over 14 years on the Ranch. But for 13 of those 14 years, they were a married couple. A " 'husband and wife assume mutual obligations of support upon marriage. These obligations are not conditioned on the existence of community property or income.' [Citation.] 'In entering the marital state, by which a contract is created, it must be assumed that the parties voluntarily entered therein with knowledge that they have the moral and legal obligation to support the other.' " (*Borelli v. Brusseau* (1993) 12 Cal.App.4th 647, 652.) This appeal presents the reverse situation to *Watkins v. Watkins* (1983) 143 Cal.App.3d 651, where an unmarried couple lived together for six years, married, and then separated eight months later. (*Id*. at p. 652.) The court concluded that *Marvin*-type rights that arose in the premarital period do not extinguish upon marriage. (*Id.* at pp. 653–654.) But the *Watkins* court also recognized that a spouse cannot contract with their partner with respect to domestic services which are incidental to the marriage status. (*Id*. at p. 654, citing *Estate of Sonnicksen* (1937) 23 Cal.App.2d 475, 479 [such contracts are contrary to public policy].) In *Watkins*, equitable consideration was given only to the premarital period. (*Watkins*, at p. 655.) In this case, it is possible the jury's inquiry into the equities of enforcing the *Marvin* agreement should have been confined to the one-year premarital period. We need not resolve that question, however, as we conclude that even as to the 14-year exchange of domestic services, substantial evidence supports the jury's verdict.

Taylor and Rolff initially filed memoranda of costs claiming $1,288.70 and $1,002, respectively. Rolff later withdrew one item of costs for $49, and was ultimately awarded $953. Below, as to Taylor, Stewart asserted: "It appears that Taylor may recover costs of $355.00 for the first paper fee and $140 in fees for filing motions, for a total of $495.00, and not the $1,299.70 he has claimed." On November 16, 2016, the court awarded $490 to Taylor, $5 less than Stewart himself said Taylor was entitled to receive. To the extent he is challenging these costs now, the challenge is forfeited for failure to raise it below.

As part of his costs, Rolff sought to recover the filing fee for a motion to declare Stewart a vexatious litigant. He also sought to recover filing fees on a motion to bifurcate and motions to set aside deemed admissions. Stewart argues that the vexatious litigant motion costs were not necessary to the conduct of the litigation in this case, and asserts that Rolff should not have been granted fees for motions that were denied. He also contends Rolff should not have been awarded costs for a copy of the clerk's transcript in appeal No. A126382 because Rolff was not a party to that appeal.[21]

We review a trial court's order granting or denying a motion to tax costs for abuse of discretion. (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1556–1557.) That is, we will reverse such an order only when the trial court's action is arbitrary, capricious, or patently absurd, resulting in a manifest miscarriage of justice. (*Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 421; *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1249–1250.)

"Under Code of Civil Procedure section 1032, the prevailing party is entitled as a matter of right to recover costs. Section 1033.5 identifies cost items that are allowable under section 1032 (§ 1033.5, subd. (a)); identifies items that are not allowable (*id.*, subd. (b)); and further provides that '[i]tems not mentioned in this section . . . may be allowed or denied in the court's discretion' (*id.*, subd. (c)(4)). Any allowable costs must be 'reasonably necessary to the conduct of the litigation rather than merely convenient or

[21] The total of the costs at issue in this appeal is $443.

beneficial to its preparation,' and reasonable in amount. (*Id.*, subd. (c)(2), (3).)" (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 989–990.)

" 'In ruling upon a motion to tax costs, the trial court's first determination is whether the statute expressly allows the particular item and whether it appears proper on its face. "If so, the burden is on the objecting party to show [the costs] to be unnecessary or unreasonable." [Citation.] Where costs are not expressly allowed by the statute, the burden is on the party claiming the costs to show that the charges were reasonable and necessary. ' " (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 71.)

Code of Civil Procedure section 1033.5 subdivision (a)(1) allows for the recovery of motion fees. While Stewart asserts that the filing fees for the motion to declare him a vexatious litigant were not necessary to the conduct of the case since they were filed after the trial, the motion was filed before judgment was entered by the trial court. Based on Stewart's repeated abuse of the legal process, the lower court could have concluded that the vexatious litigant motion was reasonably necessary to preclude the filing of excessive posttrial motions. As to the motions to set aside deemed admissions made by the special administrator, Rolff persuasively argues that these motions "were necessary to protect [his] interest in the real property, since [Stewart] claimed that the particular 'admissions' against the estate affected the transfer of the property to Rolff," and because the special administrator had not addressed the issue.

As to the costs for the transcript in appeal No. A126382, Rolff notes that the appeal arose from this contract action, wherein Stewart appealed the denial of a preliminary injunction that would have granted him exclusive possession of the Ranch. Rolff was granted status as an intervenor prior to the issuance of our opinion. Stewart argues that we did not award costs when we decided that appeal. That is irrelevant, as Rolff was not a party to the appeal. Moreover, it appears Rolff was not given notice of that appeal even though Rolff was granted leave to intervene in the action before Stewart filed his notice of appeal. In any event, because the appeal involved the instant litigation, we cannot say the trial court abused its discretion in awarding costs for the transcript.

Finally, Stewart argues the motion to strike costs should have been granted because his opponents' memoranda of costs were not verified. The claim is not well taken, as both memoranda were verified by the parties' attorneys, which is permitted under California Rules of Court, rule 3.1700(a)(1).

DISPOSITION

Deborah's appeal is dismissed for lack of standing to appeal. As to Stewart's appeals, the judgment and orders appealed from are affirmed.

_____
Sanchez, J.

WE CONCUR:

_____
Margulies, Acting P. J.

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Banke, J.